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Arnold Schwarzenegger
Governor

April 16, 2004

To: Enclosed Cachuma Project Hearing Service List

CACHUMA PROJECT HEARING – APPLICATIONS 11331 AND 11332

This letter rules on motions filed on behalf of the Cachuma Project Member Units and the Santa Ynez River Water Conservation District (SYRWCD) to strike Appendices 1-4 of CalTrout's closing brief, Appendix 1 of the Department of Fish and Game's (DFG) closing brief, and Appendix B of NOAA Fisheries' closing brief, and to dismiss NOAA Fisheries as a party to the hearing. This letter also rules on the City of Lompoc's motion to strike the appendices and specified references to the appendices contained in the parties' closing briefs.

CalTrout's Appendix 1, DFG's Appendix 1, and NOAA Fisheries' Appendix B are all the same document, a study proposal entitled "Santa Ynez River Fish Passage Feasibility Analysis." CalTrout Appendix 2 is a four and a half page response to the rebuttal testimony of Misty Gonzales. CalTrout Appendix 3 is a water conservation study proposal. And CalTrout Appendix 4 is a study proposal for modification of the downstream water rights release schedule. The Cachuma Project Member Units, SYRWCD, and the City of Lompoc contend that these appendices are evidentiary documents that were improperly submitted after the hearing record had closed.

For the reasons set forth below, the motions to strike the appendices are granted and the motion to dismiss NOAA Fisheries as a party is denied.

Although I advised the parties at the close of the hearing that they could attach appendices to their closing briefs, I did not intend to provide an exception to the 30-page limit for closing briefs, or to provide an exception to the rule, set forth in the hearing notice, against attaching an evidentiary document to a closing brief unless the document is in the hearing record or is the subject of an offer into evidence.

CalTrout argues that CalTrout Appendices 1, 3 and 4 are not evidentiary documents because they were not offered to prove that the studies in question should be conducted. Rather, CalTrout maintains that the appendices were intended to assist the State Water Resources Control Board (SWRCB) in drafting an order if the SWRCB determines, based on the hearing record, that the U.S. Bureau of Reclamation should be required to conduct further studies. DFG and NOAA Fisheries make the same argument with respect to DFG Appendix 1 and NOAA Fisheries Appendix B. Regardless of the parties' intent, however, these appendices contain evidentiary material. The appendices contain recommendations concerning what the elements of the various studies should be, which amounts to expert opinion. CalTrout's Appendix 2 contains mostly legal argument based on evidence in the hearing record, but as an extension of CalTrout's

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closing brief the appendix exceeds the 30-page limit. For the foregoing reasons, the appendices are stricken from the record.

The City of Lompoc's motion to strike portions of the closing briefs is granted to the extent that the closing briefs contain explicit references to the appendices or factual allegations that are based exclusively on the appendices. At this point, however, it is not necessary to parse the closing briefs line-by-line. In reviewing the closing briefs, the SWRCB will take into account the fact that the appendices have been stricken, and in formulating a decision the SWRCB will not rely on evidence that is outside the hearing record.

Finally, I am satisfied that NOAA Fisheries did not deliberately flaunt the SWRCB's procedural requirements and dismissing NOAA Fisheries as a party to the proceeding would be excessive. Striking Appendix B from NOAA Fisheries' closing brief is an appropriate remedy.

If you have any questions about this letter, please contact Dana Differding, Staff Counsel, at (916) 341-5188.

Sincerely,

Original Signed By Harry M. Schueller for

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Hearing Officer

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Cachuma Project Hearing
Phase-2 Hearing
Final Service List

Updated 01/05/2004

(Note: The parties whose E-mail addresses are listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)

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